(2)

No. 94-1558

SUPREME COURT, U.S.
FILED
MAY 30 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FRANCIS W. PARKER SCHOOL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

CHARLES L. MICHOD, JR.*
DON R. SAMPEN
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
135 South LaSalle Street
19th Floor
Chicago, Illinois 60603
(312) 368-9700

CARTER G. PHILLIPS
CONSTANTINE L. TRELA, JR.
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

24pp

QUESTION PRESENTED

Whether the court of appeals properly held that a single applicant for employment who was not hired because, under the employer's policy and collective bargaining agreement, his work experience would require a salary far in excess of what was available under the employer's budget, had no claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties. The respondent, a not-for-profit corporation, has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	5
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Arnold v. *United States Postal Serv.*, 863 F.2d 994 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989) 9
California Brewers Ass'n v. *Bryant*, 444 U.S. 598 (1980) 11
City of Los Angeles Dep't of Water and Power v. *Manhart*, 435 U.S. 702 (1978) 15
County of Washington v. *Gunther*, 452 U.S. 161 (1981) 15
DiBiase v. *SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995) 8
EEOC v. *Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984), *overruled in part by Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158 (1989), *as recognized in American Ass'n of Retired Persons* v. *Farmers Group, Inc.*, 943 F.2d 996 (9th Cir. 1991) 6
EEOC v. *Local 350, Plumbers and Pipefitters*, 998 F.2d 641 (9th Cir. 1992) 8, 9
EEOC v. *Wyoming*, 460 U.S. 226 (1983) 15, 16
Faulkner v. *Super Valu Stores, Inc.*, 3 F.3d 419 (10th Cir. 1993) 9
Geller v. *Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 6, 14
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971) 13, 16
Hazen Paper Co. v. *Biggins*, 113 S. Ct. 1701 (1993) 3, 4, 6, 7, 9
Hiatt v. *Union Pac. R.R.*, 859 F. Supp. 1416 (D. Wyo. 1994) 8
Houghton v. *Sipco, Inc.*, 38 F.3d 953 (8th Cir. 1994) 8
Leftwich v. *Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983) 6
Lorillard v. *Pons*, 434 U.S. 575 (1978) 13
Martincic v. *Urban Redevelopment Auth.*, 844 F. Supp. 1073 (W.D. Pa. 1994) 8
Massarsky v. *General Motors Corp.*, 706 F.2d 111 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983) 9

TABLE OF AUTHORITIES—Continued

Page

Metz v. *Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987) 7, 15
Wards Cove Packing Co. v. *Atonio*, 490 U.S. 642 (1989) 12
Washington v. *Davis*, 426 U.S. 229 (1976) 13

STATUTES, LEGISLATIVE MATERIALS AND REGULATIONS

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* i
§ 623 ..... 1, 10, 11, 13, 14
42 U.S.C. § 2000e-2 ..... 10, 12
The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 12
137 *Cong. Rec.* S15276 (1991), *reprinted in* 1991 *U.S.C.C.A.N.* 767 12
29 C.F.R. § 1607.11 (1988) 14

OTHER AUTHORITIES

EEOC, *Legislative History of the Age Discrimination In Employment Act* (1981) 15
2A Sutherland Statutory Construction § 46.06 (5th ed. 1992 rev.) 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1558

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

FRANCIS W. PARKER SCHOOL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Francis W. Parker School, hereby opposes the petition for a writ of certiorari filed by the Equal Employment Opportunity Commission and urges the Court to deny the Commission's request to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

STATUTORY PROVISION INVOLVED

Petitioner correctly cites the statutes involved. Section 4(f)(2) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 623(f)(2), which was omitted from petitioner's appendix (see Pet. App. 47a), states in relevant part as follows (as it read in 1989):

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> * * * *

(2) to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this chapter . . . .

STATEMENT OF THE CASE

1. Respondent, Francis W. Parker School, is a private, not-for-profit primary and secondary school operating in Chicago. It had 84 full- or part-time teachers during the 1988-89 school year. At least 52 percent of its teachers were in the age category of 40 or older at the beginning of that school year. (R. 32, Cotton Aff. ¶¶ 1-3 and Ex. A to R. 32.)[1] According to the statistical evidence presented by petitioner below, respondent hired a greater percentage of teacher applicants age 40 or older than it hired teacher applicants under the age of 40. (R. 32, Ex. G, Attach. D.)

Respondent's teacher salaries are set in accordance with its collective bargaining agreement with its teachers. The agreement embodies a 22-step system in which each step corresponds to a teacher's years of experience, up to 22 years, and provides for an increasing level of salary based directly on years of experience. (Pet. App. 2a.) In 1989, a teacher with one year of experience—step 1—was paid about $22,000. A teacher with 22 years of experience was paid about $46,000. (Pet. App. 19a-20a.) Respondent used the same system to determine the starting salaries of new teachers. It credited new teachers with years of teaching elsewhere. (Pet. App. 2a.)

The step system rewards experience and encourages teachers to stay in teaching. The system has worked well for respondent in attracting and retaining high-quality educators. (R. 32, Cotton Aff. ¶ 5.) Nevertheless, because of budgetary constraints, respondent must seek a balance in its faculty between more experienced teachers

---

[1] "R" refers to the numbered items in the official record of the court of appeals.

at higher salaries and less experienced teachers at lower salaries. (R. 32, Cotton Aff. ¶ 6.)

A vacancy opened in respondent's drama department early in the 1988-89 school year. Paul Druzinsky, the drama department head, led the search for the new teacher. (Pet. App. 20a.) Respondent's principal, John Cotton, restricted by the school's budgetary constraints, set a maximum salary for the new teacher of $28,000. (Pet. App. 2a.) After publicizing the vacancy, Druzinsky received and reviewed 15 to 30 resumes and interviewed about a half dozen candidates. (Pet. App. 20a.) He then narrowed the pool to three finalists and submitted their names to Cotton. (Pet. App. 21a.) The finalist interviews took place between March 14 and March 24, 1989. After a meeting on March 27, Nancy Bishop was selected to fill the vacancy at a starting salary of $22,000. (*Id.*)

In the meantime, on March 13, after Druzinsky had announced the three finalists, one of respondent's music teachers asked Druzinsky to review the resume of a drama teacher named Harold Johnson. (Pet. App. 2a.) Johnson was 63 years old with 30 years of teaching experience. (*Id.*) Under respondent's step system of compensation, Johnson's salary would have been $46,000. Accordingly, Druzinsky called Johnson a week later to advise Johnson that he would not be hired because respondent could not afford him. (Pet. App. 2a-3a.)

2. Johnson filed an administrative complaint with petitioner Equal Employment Opportunity Commission on April 11, 1989. Petitioner filed this lawsuit in the United States District Court for the Northern District of Illinois, alleging a violation of the ADEA, 29 U.S.C. § 621 *et seq.*, under both disparate treatment and disparate impact theories. Respondent moved for summary judgment on August 27, 1992, and that motion was denied on March 23, 1993. (Pet. App. 19a.) *Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701 (1993), was decided shortly thereafter, and respondent moved for reconsideration based on *Hazen*

Paper. The district court allowed the motion and granted summary judgment on the disparate treatment claim only. (Pet. App. 42a.) Pursuant to the court's invitation, respondent then filed a further motion for summary judgment on the disparate impact claim. That motion was granted by order dated July 22, 1993. (Pet. App. 17a.)

The district court's final order granting summary judgment on the disparate impact claim did not reach either of the issues petitioner seeks to have this Court address. Rather the court found that respondent's decision not to hire Johnson was "wholly motivated by budgetary constraints," and that such a decision is not covered by the ADEA. (Pet. App. 18a.) The court expressly refrained from "reach[ing] the broader question of whether the disparate impact theory is fundamentally incompatible with ADEA liability." (*Id.*)

3. Petitioner appealed, but sought review only on the disparate impact issue. A divided Seventh Circuit affirmed on three grounds. First, the court of appeals relied upon this Court's interpretation of the ADEA in *Hazen Paper*. This Court in *Hazen Paper* observed that inaccurate stereotyping of the elderly is "the essence of what Congress sought to prohibit in the ADEA." 113 S. Ct. at 1706. (Pet. App. 5a.) Although recognizing that *Hazen Paper* was a disparate treatment case, the court of appeals concluded that the logic of this Court's decision indicated that employment decisions "not based on misperceptions about the competence of older workers" do not violate the ADEA. (Pet. App. 6a.)

Second, the court of appeals found significant distinctions between the language of the ADEA and Title VII, which made the latter a treacherous basis for construing the former statute. For example, the court construed section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1), as evidencing the Act's sole focus on eliminating decisions based on stereotypes about age. (Pet. App. 6a-7a.) Section 4(f)(1) has no parallel in Title VII. The court also

noted that, while section 703(a)(2) of Title VII proscribes actions by employers which "limit, segregate, or classify [their] employees or *applicants for employment*," the corresponding provision in section 4(a)(2) of the ADEA omits applicants from its coverage. (Pet. App. 8a.)

Third, the court of appeals found that, even under a disparate impact theory, petitioner was not "relieve[d] . . . of its obligation to prove the error of the employer's way." (Pet. App. 9a.) Petitioner utterly failed to establish the unreasonableness of respondent's policy. Indeed, the court specifically found that respondent's "policy of linking wages to experience is an economically defensible and reasonable means of determining salaries." (*Id.*)

REASONS FOR DENYING THE PETITION

1. The primary rationale offered by petitioner (Pet. 8-9) for review by this Court is an alleged conflict between the decision below and prior decisions of other circuits, which applied disparate impact analysis to particular ADEA claims. The fundamental flaw in petitioner's argument is that it is predicated on a profound mischaracterization of the holding below. To be sure, the court of appeals strongly hinted that disparate impact may not be a viable theory of liability under the ADEA in light of this Court's interpretation of the Act in *Hazen Paper*, but it manifestly did not so hold. Instead, it merely held that the prior decisions relied upon by petitioner that had employed disparate impact analysis in age discrimination cases are "inappropriate on the facts of this case." (Pet. App. 7a.)[2] Thus, the court of appeals did not purport to place itself in conflict with any other courts of appeals.

Absent an unquestioned conflict with a prior decision, it is difficult to understand why the Court should consider

[2] Indeed, even Judge Cudahy in his dissent recognized that the majority opinion stopped "slightly short" of extending as far as petitioner suggests. (Pet. App. 10a.)

the disparate impact theory under the ADEA at this time. There are several aspects about the state of the law surrounding the availability of disparate impact analysis under the ADEA that militate against review of that issue now. First, in the three cases cited by petitioner as being in direct conflict with the decision here, there was virtually no legal analysis of the issue. See *Geller* v. *Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980) (analysis of issue restricted to one paragraph), *cert. denied*, 451 U.S. 945 (1981); *EEOC* v. *Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984) (same), *overruled in part by Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 173-75 (1989), *as recognized in American Ass'n of Retired Persons* v. *Farmers Group, Inc.*, 943 F.2d 996, 1004 (9th Cir. 1991); *Leftwich* v. *Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983) (no discussion of the issue at all). Indeed, the Chief Justice's dissent from the denial of certiorari in *Geller* contains a lengthier statutory analysis of the issue than the opinions of the three courts of appeals combined. See *Markham* v. *Geller*, 451 U.S. 945, 947-48 (1981).

Second, all three decisions pre-date *Hazen Paper*. While the holding in that case unquestionably was limited to disparate treatment claims under the Act—which the court of appeals recognized—this Court's analysis of the intent of Congress embodied in the statute provides insights into how the ADEA ought to be applied in all cases. Thus, for example, the Court's observation that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA," 113 S. Ct. at 1706, indicates that the Act is somewhat narrower than Title VII. This is plainly relevant to deciding whether and how to proceed with a disparate impact analysis.

Further statements made in *Hazen Paper* cast even more doubt on the validity of the disparate impact theory.

According to the Court, Congress was concerned "that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," of necessity a form of disparate treatment. *Id.* Yet, the Court went on,

> When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.

Id. The Court went even further:

> Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age-based."

Id. at 1707. The Court then concluded that the ADEA "requires the employer to ignore an employee's age . . . ; it does not specify *further* characteristics that an employer must also ignore." *Id.*

A disparate impact analysis targets those very factors that are "analytically distinct" from age. Employment actions based on these types of factors, however, are not prohibited under the ADEA as construed in *Hazen Paper*. Short of an actual holding on the issue, it is difficult to imagine a much more explicit direction from this Court that a disparate impact theory is not available under the Act.

Petitioner is clearly wrong to assume that the analysis in *Hazen Paper* will not affect how the lower courts approach disparate impact claims under the ADEA. The Seventh Circuit's decision below is a counter example. Compare Pet. App. 1a-9a (refusing to apply disparate impact analysis to facts of this case) with *Metz* v. *Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987) (assuming that disparate impact theory is valid under

ADEA). At least three other examples also exist. *DiBiase* v. *SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) ("in the wake of *Hazen*, it is doubtful that traditional disparate impact theory is a viable theory of liability under the ADEA"; the court, however, found it unnecessary to decide the ultimate issue); *Hiatt* v. *Union Pac. R.R.*, 859 F. Supp. 1416, 1436 (D. Wyo. 1994) ("disparate impact claims are not cognizable under the ADEA"); *Martincic* v. *Urban Redevelopment Auth.*, 844 F. Supp. 1073, 1076-77 (W.D. Pa. 1994) ("we are convinced disparate impact is not a cognizable claim under the ADEA").

Petitioner recognizes this problem and cites (Pet. 9) two post-*Hazen Paper* cases to suggest that the Eighth and Ninth Circuits will not reconsider their positions. But neither case had occasion to analyze the issue or demonstrate that a decisional conflict exists after *Hazen Paper*. In *Houghton* v. *Sipco, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994), for example, the court reversed a disparate impact determination based on a faulty jury instruction and did not need to address the general availability of the theory. In *EEOC* v. *Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1992), the court discussed *Hazen Paper* in a footnote, but noted that the EEOC had failed to articulate whether it was proceeding on a disparate impact or disparate treatment theory, and it remanded in part on that basis. Accordingly, the court had no reason to consider the effect of *Hazen Paper* on a disparate impact claim.

Petitioner cites (Pet. 8-9) a half dozen other cases in which courts "assumed that the ADEA prohibits disparate impact discrimination." Even petitioner seems to acknowledge that those cases do not provide any independent basis for review by this Court because there clearly was no holding on the threshold question of whether that theory of liability is viable under the ADEA. In at least three of the cases, moreover, the courts expressly declined

to decide the applicability issue as unnecessary because there was a failure to prove any disparate impact. *Faulkner* v. *Super Valu Stores, Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993); *Arnold* v. *United States Postal Serv.*, 863 F.2d 994, 998 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 846 (1989); *Massarsky* v. *General Motors Corp.*, 706 F.2d 111, 121 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983). In the remaining cases, relief was similarly denied because of a failure of proof. Therefore, none of these cases is in conflict with the Seventh Circuit.

In sum, it is fanciful to assume that pre-*Hazen Paper* rulings will retain their vitality in light of the Court's clear guidance on the scope and purpose of the ADEA. The Court should wait to see if a genuine conflict in the circuits arises post-*Hazen Paper* before resolving the question presented.

Finally, petitioner's showing that the issue has significant consequences that make it worthy of review is woefully inadequate. Petitioner can identify no more than "approximately 20 suits" over the course of the past six years in which a disparate impact theory was even included in a complaint. Petitioner does not attempt to show that the theory had any relevance to the ultimate disposition of *any* of those cases. Given that disparate impact cases can readily be converted to disparate treatment cases by proof of motive,[3] it is possible that all the cases included in the EEOC's informal survey would have been resolved in precisely the same way with or without the disparate impact theory. Thus, petitioner has no overriding enforcement need to have the disparate impact issue resolved that could excuse the absence of a real conflict in the circuits as a basis for obtaining certiorari.

---

[3] *See, e.g., Hazen Paper Co.* v. *Biggins*, 113 S. Ct. 1701, 1705 (1993); *EEOC* v. *Local 350, Plumbers and Pipefitters*, 998 F.2d 641, 648 n.2 (9th Cir. 1992).

2. Not only is there no need to decide the disparate impact issue at this time, but this case is an extraordinarily poor vehicle for deciding the issue in any event. There are at least three considerations present here—and absent from the other cases cited by petitioner—that provide an independent basis for affirming the Seventh Circuit and thus make it unnecessary for this Court to reach the disparate impact theory.

First, petitioner never explains why the disparate impact issue should be considered in a case involving an applicant for employment. There is no question that the pivotal language in Title VII "applicants for employment" is excluded from the operative provision in the ADEA. Compare 42 U.S.C. § 2000e-2(a)(2) with 29 U.S.C. § 623(a)(2). None of the other cases involving the disparate impact theory that are cited by petitioner as in conflict with the decision below involved an applicant for employment. This is a unique twist that complicates the case and jeopardizes the Court's ability to rule on the underlying issue of the validity of the disparate impact theory under the ADEA.

Petitioner presents (Pet. i) the applicability of the ADEA to applicants as a separate issue in the petition, but that issue is plainly unworthy of review by this Court. Petitioner does not even cite one other case in which the issue has been resolved, much less any decision that conflicts with the treatment below. Moreover, the issue was not separately decided in this case; it was merely used as a basis for distinguishing Title VII in the process of deciding how to apply the disparate impact theory to this case.

Second, the employment policy applied in this case was based on a seniority system embodied in a collective bargaining agreement, which also complicates the case and makes it a questionable vehicle for deciding the issue presented by petitioner. Section 4(f)(2) of the ADEA provides an exemption for an employer "to observe the

terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes" of the ADEA. 29 U.S.C. § 623(f)(2). The court of appeals found that the respondent's step system was protected by this "safe harbor." (Pet. App. 9a.)

Petitioner argued below that the step system does not qualify as a seniority system because a seniority system applies only to incumbent employees. In *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598 (1980), this Court held that a "seniority system" is a scheme that "allots to employees ever improving rights and benefits as their relative lengths of pertinent employment increase." *Id.* 605-06. The Court went on to make clear, however, that the rights could begin to accumulate either at the time of company employment or at the time of industry employment. *Id.* at 606-07 & n.17. This definition clearly encompasses respondent's step system and hiring policy.

The applicability of the section 4(f)(2) exemption makes it unnecessary for this Court to reach the question raised in the petition. This Court, moreover, has already provided direction to the lower courts with respect to the definition of a seniority system. Petitioner makes no claim that the court of appeals' reliance on section 4(f)(2) was in error or that the court applied that section in a manner inconsistent with other courts of appeals or the direction provided by this Court. Accordingly, the Court should choose a better case in which to address petitioner's argument.

Third, even if the disparate impact theory applied, respondent had a completely valid business justification for its employment decision. Thus, resolution of the question presented by petitioner not only would make virtually no difference to petitioner's enforcement of the ADEA, but also would not even make any difference in the proper outcome of this case.

In *Wards Cove Packing Co.* v. *Atonio*, 490 U.S. 642 (1989), this Court explained the nature of the business justification required of a defendant in a Title VII case. Under the *Wards Cove* standard,[4] respondent's reliance upon the step system was plainly legal. Respondent declined to hire Johnson solely because he was too expensive. And petitioner did not directly challenge this justification in the courts below. Instead, it argued that respondent should modify the step system policy to enable applicants with high experience levels to compete for low-paying positions. (See Pet. 3.) The court of appeals rejected this argument. The court found that respondent's "policy of linking wages to experience is an economically defensible and reasonable means of determining salaries." (Pet. App. 9a.)

Nothing more is required under *Wards Cove*. Once a policy is found to be reasonable, there is no requirement that the employer modify the policy for each new circumstance each time the policy is to be applied. Under *Wards Cove*, a plaintiff may propose an alternative policy or "selection device," but the employer need not adopt it unless the plaintiff establishes that the employer's current policy is a mere "pretext" for discrimination. 490 U.S. at 660. The district court found that respondent's policy was not a mere pretext. (Pet. App. 18a.) Accordingly, whether or not petitioner can rely generally on a disparate impact theory, it is clear that no violation of the ADEA is present here under any theory. The Court should wait for a case in which the question presented in the petition is critical to the outcome of the dispute.

---

[4] The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 ("CRA"), restored pre-*Wards Cove* disparate impact standards to Title VII. 42 U.S.C. § 2000e-2(k); "Interpretive Memorandum," 137 *Cong. Rec.* S15276 (1991), *reprinted in* 1991 *U.S.C.C.A.N.* 767. The CRA did not amend the ADEA. Petitioner acknowledged the limited scope of the CRA in its brief in the court of appeals.

3. Petitioner devotes (Pet. 9-14) the bulk of its petition to arguing that the decision below was incorrect. Obviously, mere error is not a compelling reason to grant any petition. In this case, however, the court of appeals clearly was correct in its interpretation. As shown above, the decision below was plainly faithful to the spirit of *Hazen Paper* in limiting the sweep of the ADEA. Moreover, the decision is completely supported by the language, structure and history of the Act.

a. Petitioner argues (Pet. 9-10) that the similarity in some of the language between Title VII and the ADEA compels a different conclusion. While there are some similarities in language, there are also many differences. Indeed, in *Lorillard* v. *Pons*, 434 U.S. 575 (1978), cited by petitioner, this Court noted both similarities and differences. In particular, it found "significant differences" in the "remedial and procedural provisions of the two laws." *Id.* at 584.

The very fact that Congress placed age discrimination restrictions in a statutory scheme separate from Title VII suggests that the two laws need not be construed in the same way. See *Washington* v. *Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) ("there is sufficient individuality and complexity to [Title VII], and to the regulations promulgated under it, to make it inappropriate simply to transplant those standards in their entirety into a different statutory scheme having a different history").

One important difference in language between Title VII and the ADEA is section 4(f)(1) of the ADEA, 29 U.S.C. § 623(f)(1). This provision has no parallel in Title VII. It exempts from the ADEA actions based on "reasonable factors other than age." This difference was emphasized by the court below. (Pet. App. 6a-7a.) Petitioner (Pet. 11-12) urges this Court to ignore this difference in the two statutory schemes. It argues that the reasonable factors provision simply adopts the "business necessity" standard of Title VII, recognized in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).

Petitioner's interpretation renders the entire exception meaningless. Business necessity concepts were already a part of Title VII, even in the absence of the "reasonable factors" language, prior to *Wards Cove*. See, *e.g.*, 29 C.F.R. § 1607.11 (1988) (under petitioner's impact theory, selection procedures will be invalidated unless a "business necessity" is demonstrated). See also pp. 11-12, *supra*. In its brief in the court of appeals, petitioner advocated the traditional rule of statutory construction that meaning must be given to each word and clause in a statute. See 2a Sutherland Statutory Construction § 46.06 (5th ed. 1992 rev.). Petitioner now reverses itself and argues, in effect, that an entire statutory exception should be read out of the statute.

Apart from making the language meaningless, petitioner's interpretation is inconsistent with the language of section 4(f)(1). That section states in relevant part:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification, reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .

29 U.S.C. § 623(f)(1). This language readily shows that the "reasonable factors" exception is set forth in the disjunctive to the bona fide occupational qualification ("BFOQ") exception described in the first part of subparagraph (1). The business necessity standard applies to the BFOQ. It clearly does not modify an employer's right to rely upon "reasonable factors other than age."

In his dissent from the denial of certiorari in *Markham* v. *Geller*, 451 U.S. 945, 948-49 (1981), the Chief Justice made clear his view that the reasonable factors language of section 4(f)(1) undermined the application of a disparate impact theory to an ADEA claim. Judge Easterbrook reached the same conclusion in his dissent

in *Metz* v. *Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting). Judge Easterbrook relied, in part, upon the interpretation by this Court of similar language in the Equal Pay Act. *County of Washington* v. *Gunther*, 452 U.S. 161, 170-71 (1981); *City of Los Angeles Dep't of Water and Power* v. *Manhart*, 435 U.S. 702, 710-11 n.20, 713 n.24 (1978). This Court's construction of the Equal Pay Act adds considerable weight to the Seventh Circuit's reliance on the reasonable factors language in reaching its decision below.

The court of appeals thus appropriately considered differences between the ADEA and Title VII and relied upon those differences in correctly interpreting the ADEA. There consequently is no need for this Court further to consider the matter based on alleged error.

b. Although the court of appeals did not find it necessary to analyze the legislative history of the ADEA, that history fully supports the court's decision. This Court in *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), analyzed the legislative history in detail. The Court in *Wyoming* discussed a report of the Secretary of Labor entitled "The Older American Worker: Age Discrimination in Employment" (1965) ("Secretary's Rep."), the preparation of which had been mandated in the Title VII legislation.

The Secretary's Report is reprinted in EEOC, *Legislative History of the Age Discrimination In Employment Act* (1981). It provided much of the factual and theoretical bases for the ADEA. The Court summarized the Secretary of Labor's findings, which it noted were confirmed by the Executive Branch and Congress:

> (1) Many employers adopted specific age limitations in those States that had not prohibited them by their own antidiscrimination laws, although many other employers were able to operate successfully without them. (2) In the aggregate, these age limitations had a marked effect upon the employment of

> older workers. (3) Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact, and was often defended on grounds different from its actual causes. (4) Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that, as an overall matter, the performance of older workers was at least as good as that of younger workers. (5) Finally, arbitrary age discrimination was profoundly harmful . . . .

460 U.S. at 231.

The ADEA thus evolved from a concern with the harm resulting from specific but arbitrary age limitations based on a stereotypical view of older workers, and not on the kind of invidious animus that gave rise to other anti-discrimination legislation. Secretary's Rep. 6 ("We have found no evidence of prejudice based on dislike or intolerance of the older worker"). This view of the ADEA legislative history may be readily contrasted with this Court's treatment of Title VII, where the Court found a clear congressional intent to eradicate longstanding employment barriers that "operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971); see also Secretary's Rep. 5-6 ("Discrimination in employment based on race . . . is accompanied by and often has its origin in prejudices that originate outside the sphere of the employment").

The Secretary's Report specifically recommended legislation to deal with the problems of "persistent and widespread use of age limits in hiring" which amounted to "arbitrary discrimination against older workers." Secretary's Rep. 37. As to "employment practices which quite unintentionally lead to age limits in hiring"—*i.e.*, disparate impact discrimination—no legislation was recom-

mended. Secretary's Rep. 38. Rather, the Secretary suggested other responses, such as studying the feasibility of a system of portable pension credits, encouraging new forms of private annuity coverage and reviewing gaps in workers' compensation plans. *Id.*

In short, the ADEA's legislative history indicates that the legislation targeted intentional, disparate treatment type age discrimination, and not unintentional disparate impacts. This Court has already explored the ADEA's legislative history in *Wyoming*, and no purpose would be served by a further review of it in this case.

* * * *

At the end of the day, it is difficult to understand why petitioner has sought review of this case. The holding below is much more equivocal than petitioner suggests. That holding follows from a very recent decision of this Court, which has not yet been analyzed extensively by the lower courts. Moreover, to get to the issue on which petitioner seeks review, the Court must resolve a threshold question concerning the applicability of the Act to applicants for employment, an issue which is in no way worthy of this Court's attention.

Nor is there anything specific about this case that makes it particularly worthy of note. Respondent plainly did not act invidiously in declining to hire Johnson. It acted pursuant to unquestionably real budgetary constraints and followed the dictates of its bona fide seniority system, which was the product of collective bargaining. To have treated Johnson as petitioner proposes would have violated respondent's hiring policy under that agreement, a point petitioner reasonably can ignore but respondent could not.

In addition, respondent is a small educational institution with limited resources. Its money will be better spent educating its students than litigating this case further. That might not be reason enough to deny review

in a case otherwise clearly worthy of this Court's attention, but it certainly should tip the balance against review in a case presenting an issue that so plainly does not require resolution by this Court at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CHARLES L. MICHOD, JR.*
DON R. SAMPEN
MARTIN, CRAIG, CHESTER & SONNENSCHEIN
135 South LaSalle Street
19th Floor
Chicago, Illinois 60603
(312) 368-9700

CARTER G. PHILLIPS
CONSTANTINE L. TRELA, JR.
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondent

* Counsel of Record

May 30, 1995